86

(4)

No. 07-748

FILED
FEB 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

PUERTO RICAN ASSOCIATION OF BEER IMPORTERS, INC., ET AL.,

Petitioners,

v.

COMMONWEALTH OF PUERTO RICO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

REPLY BRIEF FOR THE PETITIONER

ANA-MATILDE NIN-TORREGROSA
NIN-TORREGROSA LAW OFFICE
Suite 1801
Citibank Tower
252 Ponce de León Ave.
San Juan, Puerto Rico 00918

RICHARD H. PILDES
Counsel of Record
Vanderbilt Hall, Room 507
40 Washington Square South
New York City, New York 10012
(212) 998-6377

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

ADDITIONAL COUNSEL

VERÓNICA FERRAIUOLI-HORNEDO
NIGAGLIONI & FERRAIUOLI
PO Box 195384
San Juan, Puerto Rico 00919

JUAN A. MARQUÉS-DÍAZ
MCCONNELL VALDÉS LLC
PO Box 364225
San Juan, Puerto Rico 00936

HORACIO SUBIRÁ
PO Box 4836
Carolina, Puerto Rico 00984

RAMÓN WALKER-MERINO
PO Box 9023550
San Juan, Puerto Rico 00902

FEDERICO CALAF-LEGRAND
REICHARD & CALAF, PSC
PO Box 9022946
San Juan, Puerto Rico 00902

TABLE OF CONTENTS

Page

1. The Federal Courts and the Puerto Rico Supreme Court Are In Conflict on a Constitutional Issue of National Importance.... 1

2. The Issue Is Squarely Presented, Particularly In Light of the Ongoing Resistance of the Puerto Rico Supreme Court 4

3. This Court Remains the Only Federal Forum in Which Petitioners' Constitutional and Federal Statutory Claims Can Be Heard 9

4. Respondents' Argument that the Petition Seeks an Advisory Opinion Is Misconceived and Groundless 11

5. The Importance of the Questions Warrant This Court's Review 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984) 6

Buscaglia v. Ballester, 162 F.2d 805 (1st Cir. 1947) 5

García v. Bauzá Salas, 686 F.Supp. 965 (D.P.R. 1988) 1

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) 7

Michigan v. Long, 463 U.S. 1032 (1983) 2

New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) 7

Starlight Sugar, Inc. v. Soto, 253 F.3d 137 (1st Cir. 2001) 1, 2

Trailer Marine Transp. Corp. v. Vazquez, 977 F.2d 1 (1st Cir. 1992) 5

U.S. Brewers Ass'n v. Perez, 455 F.Supp. 1159 (D.P.R. 1978) 9

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S.Ct. 1786 (2007) 7

PUERTO RICO CASES

Banco Popular de Puerto Rico v. Municipio de Mayaguez, 126 D.P.R. 653 (1990) 8

TABLE OF AUTHORITIES – Continued

Page

R.C.A. v. Gov't of the Capital, 91 D.P.R. 416 (P.R. 1964) 3, 4, 12

U.S. Brewers Ass'n v. Secretary of the Treasury, 109 D.P.R. 456, 9 P.R. Offic. Trans. 605 (1980).....5, 6

1. The Federal Courts and the Puerto Rico Supreme Court Are In Conflict on a Constitutional Issue of National Importance.

The government of Puerto Rico does not dispute that the federal courts and the Puerto Rico Supreme Court are in direct conflict over whether the dormant Commerce Clause applies to Puerto Rico. Nor does Puerto Rico dispute that the federal courts have *expressly* acknowledged this conflict. Indeed, the federal courts have gone so far as to hold it futile to bring dormant Commerce Clause cases in the Puerto Rico courts precisely because the Puerto Rico Supreme Court holds the Clause inapplicable. *See, e.g.*, *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 144-45 (1st Cir.), *cert. denied,* 534 U.S. 1021 (2001); *García v. Bauzá Salas*, 686 F.Supp. 965, 967 (D.P.R.), *rev'd on other grounds*, 862 F.2d 905 (1st Cir. 1988)(holding Anti-Injunction Act barred District Court injunction). Similarly, Puerto Rico does not dispute that its courts have never held any statute or regulation of its government to violate the dormant Commerce Clause or the Federal Relations Act (FRA). Indeed, the government's brief *itself* refuses even to acknowledge that the Clause applies to Puerto Rico. Thus, as the general caselaw and the specific legislative history of Acts No. 69 and 108 demonstrate, Pet.Br. at 17-21, all three branches of the Puerto Rico government – the legislative, executive, and judicial branches, including the Puerto Rico Supreme Court – refuse to acknowledge that the dormant Commerce Clause applies to Puerto Rico.

An essential role of this Court is to ensure uniformity in federal law. The "important need for uniformity in federal law," *Michigan v. Long*, 463 U.S. 1032, 1040 (1983), is particularly heightened when conflicts exist between federal and local courts over the meaning and application of the Constitution. Yet the Puerto Rico Supreme Court seeks to evade this Court's oversight and disable this Court from performing that essential role, on an issue clearly controversial within the Puerto Rico courts, by issuing a decision that refuses to provide any reasons for that court's decisions – even as that court refuses, in practice, to apply the dormant Commerce Clause at all.

That the Puerto Rico Supreme Court is willfully evading this Court's review is made clear by the history of the interaction between the federal and Puerto Rico courts over the dormant Commerce Clause. For many years, the federal courts of appeals have made clear that, unless the Puerto Rico Supreme Court clarifies otherwise, the federal courts will continue to understand that the Puerto Rico Supreme Court holds that the Clause does *not* apply in full to Puerto Rico. *See, e.g., Starlight Sugar*, 253 F.3d at 143. Yet in numerous cases, including this one, the Puerto Rico Supreme Court has refused to reject that understanding or even to address the issue, let alone to state its position clearly. As the First Circuit has held, "the *R.C.A.* case offers the only substantive statement on application of the Commerce Clause to Puerto Rico by the Puerto Rico

Supreme Court." *Id.* (describing *R.C.A. v. Government of the Capital*, 91 D.P.R. 416, 418 (P.R. 1964)). Furthermore, the First Circuit has recognized that *R.C.A.* holds, "at a minimum," that there can be "situations in which the Commerce Clause would not apply to Puerto Rico, even though it would constrain a State in comparable circumstances." *Id. See also* Pet.Br. at 21-25 (discussing *R.C.A.* case). The Puerto Rico Supreme Court has left that understanding in place. That court has said nothing, in this case or any other, to reject the federal courts' understanding that a profound conflict exists over whether the dormant Commerce Clause applies to Puerto Rico.

The two Puerto Rico justices who issued concurring opinions below reveal how dramatic the divide is within that court over whether the dormant Commerce Clause applies at all to Puerto Rico. The federal courts have directly acknowledged their direct conflict with the Puerto Rico Supreme Court on this issue. The dormant Commerce Clause claim was clearly presented to the Puerto Rico courts; indeed, it is a central basis of petitioners' complaint. *See* Pet. App. at 232-36. The Puerto Rico Supreme Court should not be permitted to evade this Court's review by cagily refusing to provide any reasons for its decision. This Court's review is the only way to ensure uniform interpretation and application of the dormant Commerce Clause to Puerto Rico.

2. The Issue Is Squarely Presented, Particularly In Light of the Ongoing Resistance of the Puerto Rico Supreme Court.

This case is one of the largest dormant Commerce Clause challenges to confront the Puerto Rico Supreme Court. Puerto Rico does not dispute that the local brewer has paid around $100 million less in taxes than if Puerto Rico had taxed local and off-island producers equally. Pet.Br. at 25. Two justices on the Puerto Rico Supreme Court wrote at length to dispute whether the Clause applies. The federal courts for many years have attempted to get the Puerto Rico Supreme Court to clarify whether it has changed direction, to announce whether it has decided to overrule *R.C.A.*, and to apply the dormant Commerce Clause. Yet the Puerto Rico Supreme Court in this case, as it has for two decades at least, refused to address the dormant Commerce Clause issue. In this context, if the Puerto Rico Supreme Court can reject dormant Commerce Clause claims without having to indicate whether the Clause applies to Puerto Rico and how, there is no reason that court will not continue to avoid this Court's review by similarly rejecting such claims without providing reasons in future cases.

Puerto Rico argues that at least the lower courts did address and reject the dormant Commerce Clause claims on the merits, even if the Puerto Rico Supreme Court continues to hold that the Clause does not apply at all to Puerto Rico. But this argument is flawed for four reasons.

First, the trial court expressly concluded that its own supreme court had resolved authoritatively that the dormant Commerce Clause does not apply to Puerto Rico. Pet. App. at 111. It would be unrealistic to conclude that that court's further discussion of the dormant Commerce Clause issue was not infected by its tainted starting point: that its own supreme court had concluded that the Clause did not apply in the first place.

Second, as Puerto Rico concedes, both lower courts concluded they were bound by a decision of the Puerto Rico Supreme Court nearly 30 years ago that addressed an earlier version of the differential beer taxation scheme. *See U.S. Brewers Ass'n v. Secretary of the Treasury,* 109 D.P.R. 456, 9 P.R. Offic. Trans. 605 (1980). Indeed, to the extent the lower courts addressed the merits of petitioners' claims, the entire foundation of that discussion was the conclusion that *U.S. Brewers* obligated the lower courts to reject petitioners' claims. But the federal courts did not establish that the dormant Commerce Clause applies to Puerto Rico until Judge Boudin's 1992 opinion in *Trailer Marine Transport Corp. v. Vazquez*, 977 F.2d 1 (1st Cir. 1992). Indeed, in so holding, the First Circuit had to overrule its own earlier precedents holding the dormant Commerce Clause inapplicable to Puerto Rico. *Id.* at 9, n.5 (overruling *Buscaglia v. Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947)). Thus, *U.S. Brewers* was decided when neither the federal nor the Puerto Rico courts believed the dormant Commerce Clause applied to Puerto Rico.

Not surprisingly, no dormant Commerce Clause claims were raised in the *U.S. Brewers* case, and the court did not address the dormant Commerce Clause at all, let alone issue any holding as to whether earlier versions of the beer tax violated it. Respondent is thus completely inaccurate in representing that *U.S. Brewers* gave "due consideration" of "the dormant commerce clause." Opp.Br. at 6. It did not: *U.S. Brewers* applied a rational-basis test and nowhere addressed the dormant Commerce Clause. Moreover, petitioners are challenging *recent* enactments, Acts 69 and 108, not the law at issue nearly 30 years ago. That the lower courts would treat *U.S. Brewers* as controlling petitioners' dormant Commerce Clause challenges today illustrates just how cavalierly those courts treat dormant Commerce Clause claims.

Third, the trial and intermediate courts did little more than conclude that this case differs from *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In *Bacchus*, Hawaii had exempted from taxation by name two beverages produced only from Hawaiian plants. Here, Puerto Rico did not further its protectionist design by exempting locally-produced beer by brand name, but instead by volume of production. That distinction from *Bacchus* is, at most, a purely formal one. But regardless of *Bacchus'* direct bearing on the issues raised here, the lower courts gave short shrift to all of this Court's precedents that have held unconstitutional laws that are neutral on their face but nonetheless protectionist in purpose and effect.

See, e.g., United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S.Ct. 1786 (2007); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977).

Finally, the complaint in this case was dismissed at the pleading stage. Petitioners alleged that Acts 69 and 108 are protectionist in purpose, structure and effect. *See* Pet. App. at 225-39. Petitioners' offers of proof included testimony of an expert economist on the protectionist effects of these laws, detailed evidence of the legislative history, process, and general context in which Puerto Rico enacted these laws, and similar evidence. *See* Pet.Br. at 33. But the Puerto Rico courts dismissed the complaint without permitting any discovery, without holding any evidentiary hearing, and without otherwise examining the actual substance of the allegations. If the Puerto Rico courts are prepared to dismiss dormant Commerce Clause claims in this fashion, at the pleading stage, it is clear that they are not giving any meaningful effect to the Clause.[1]

---

[1] Respondent also asserts, without any argument or discussion, that what it characterizes as "substantially similar" laws to those in Acts No. 69 and 108 exist on the mainland. Op.Br. at n.1. Petitioners disagree with that undocumented assertion: Puerto Rico's laws are specifically gerrymandered with the purpose and effect of protecting the one local, politically powerful beer producer. Because respondent provides no specific explanation or discussion of the ways in which it believes these other laws are "substantially similar," petitioner does not know

(Continued on following page)

At the very most, the lower courts in Puerto Rico might have given lip service to the dormant Commerce Clause. But in dismissing this complaint at the pleading stage, they made clear that the Clause has no effective meaning in Puerto Rico courts. Puerto Rico does not dispute that no court in Puerto Rico has ever held an action of the Puerto Rico government to violate the dormant Commerce Clause, although the federal courts, in contrast, have found numerous violations. This is hardly surprising, given that the Puerto Rico Supreme Court has authoritatively held, and has been widely perceived as having held, that the dormant Commerce Clause does not apply to Puerto Rico.[2]

---

how to respond further to this vague assertion, except to note that any substantive consideration of these or other laws would have to await full briefing on the merits.

[2] Respondent mistakenly cites a 1990 Puerto Rico Supreme Court case as having been decided in 1998. *See* Opp.Br. at 5, n.3 (*citing Banco Popular de Puerto Rico v. Municipio de Mayaguez*, 126 D.P.R. 653). Respondent cites *Banco Popular* to suggest doubt about whether the Puerto Rico Supreme Court continues to reject the dormant Commerce Clause, but because that case was actually decided in 1990, it pre-dates the First Circuit's decision to hold the Clause applicable to Puerto Rico and pre-dates all the federal court cases that expressly recognize the conflict between the Puerto Rico courts and federal courts on this issue.

3. This Court Remains the Only Federal Forum in Which Petitioners' Constitutional and Federal Statutory Claims Can Be Heard.

Despite suggestions in respondents' brief, no federal court has ever addressed the merits of any dormant Commerce Clause challenge to Puerto Rico's nearly 30-year long protectionist beer-taxation scheme. For three decades, that scheme has massively distorted interstate competition in beer sales for the purpose of protecting Puerto Rico's one local producer. Because Puerto Rico's protectionist scheme is embodied in its tax code, however, the lower federal courts consistently have held that they lack jurisdiction over such challenges, due to the Butler Act and the Tax Injunction Act. *See* Pet.Br. at 33-37. The lower federal courts have been forced to decline jurisdiction even as the federal judges most knowledgeable about Puerto Rico have concluded that this beer-taxation scheme constitutes a "prima facie" violation of the FRA, at the least, because it purposefully discriminates against off-island producers. *U.S. Brewers Ass'n v. Perez*, 455 F.Supp. 1159, 1162 (D.P.R. 1978)(Toruella, J.), *rev'd on juris. grounds,* 592 F.2d 1212 (1st Cir. 1979), *cert. denied*, 444 U.S. 833 (1979).

Respondents also try to obscure this Court's understanding of the issues presented here by devoting several pages to discussing separate litigation that the Coors Brewing Company has brought in the federal courts. Resp.Br. at 12-14. But that separate litigation only re-enforces the argument presented here. Coors is not a petitioner in this case. It chose

not to be part of the instant litigation and desperately sought a federal forum precisely because Coors concluded, as its federal filings state, that it would be "futile" to bring any dormant Commerce Clause challenge in the Puerto Rico courts – given that those courts refuse to recognize that the dormant Commerce Clause binds Puerto Rico at all. *See* Pet.Br. at 36. But just as the federal courts have concluded previously when dormant Commerce Clause and FRA challenges have been brought against protectionist provisions in Puerto Rico's tax code, the federal courts have refused jurisdiction over Coors' claims because the Butler Act and Tax-Injunction Act preclude original federal court jurisdiction. *Id.* at 34-37. Despite Puerto Rico's attempt to confuse the matter, the fact remains that this Court is the only federal court that can ever address the merits of petitioners' federal claims under the Constitution and the FRA. Only upon certiorari review of the decision of the Puerto Rico Supreme Court can any federal forum ever be made available for addressing petitioners' claims that the provisions at issue in Puerto Rico's tax code are protectionist in purpose and effect, and hence violate the dormant Commerce Clause – which must be understood and applied uniformly in the federal courts and the Puerto Rico courts – and the FRA.

4. Respondents' Argument that the Petition Seeks an Advisory Opinion Is Misconceived and Groundless.

The complaint in this case was dismissed at the pleading stage. Summary dismissal of a complaint which alleges that a Puerto Rico law is protectionist in purpose and effect is inconsistent with any plausible account of the content of the dormant Commerce Clause. The petition clearly states: "On the merits, the decision of the Puerto Rico courts to dismiss petitioners' dormant commerce clause and FRA claims at the pleading stage is wrong and should be reversed." Pet.Br. at 33.

There is nothing advisory about a decision of this Court holding that the dormant Commerce Clause applies, clarifying what faithful application of that Clause and the FRA require in the context of this challenge, and remanding for proper application of those standards. Indeed, that is precisely what this Court routinely does. Petitioners certainly would not object to this Court reaching the full merits and holding immediately that Acts No. 69 and 108 do, in fact, violate the Clause and the FRA. But because the lower courts summarily dismissed the complaint, the petition takes the appropriate step of asking that this Court clarify the application and meaning of the dormant Commerce Clause and FRA in the context of this challenge.

As noted above, the Puerto Rico Supreme Court refuses to recognize that the dormant Commerce

Clause applies to Puerto Rico. Even if the lower courts purported to assume that the Clause applies, their decision to dismiss the complaint summarily cannot be squared with any appropriate, faithful, or accepted understanding of the Clause. This Court's review is necessary to clarify that the Clause does apply to Puerto Rico in the same manner it applies to the States and to confirm that the Puerto Rico courts must give the Clause the actual legal effect this Court's precedents require. There is nothing advisory about that.

5. The Importance of the Questions Warrant This Court's Review.

Even to acknowledge that the Constitution limits the ability of Puerto Rico's government to regulate its economy without constraint is, obviously, a divisive and charged issue in Puerto Rico. Rather than address that question at all, the Puerto Rico Supreme Court uniformly rejects dormant Commerce Clause claims, often without giving any reasons, as in this case. It leaves intact its substantive ruling in the *R.C.A.* case – that the Clause does not apply – while refusing to address the fact that that ruling has been in conflict with that of the federal courts since 1992. When the pressures of local politics stand in the way of faithfully acknowledging and implementing the national Constitution, this Court's intervention is especially vital.

This Court has acted many times to clarify the legal relationship of Puerto Rico and the United States. *See* Pet.Br. at 25-30 (citing cases). Few questions are as important to that legal relationship as whether the dormant Commerce Clause and FRA prevent Puerto Rico from enacting economically protectionist legislation that discriminates in favor of local producers and against mainland and foreign competitors. Mere uncertainty about that question would justify this Court's review. But far more than mere uncertainty is involved here: as the federal courts have stated in numerous cases, there is a direct conflict between the federal courts and the Puerto Rico Supreme Court over whether the dormant Commerce Clause applies at all to Puerto Rico. Resolution of that fundamental question surely warrants this Court's review.

Respectfully submitted,

RICHARD H. PILDES
Counsel of Record
Vanderbilt Hall Room 507
40 Washington Square South
New York City, New York 10012
(212) 998-6377